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Reconciling Large-Scale Water Development and Water Quality Effects

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Reconciling Large-Scale Water Development
and Water Quality Effects

Panel

James S. Sanderson
Saunders, Snyder, Ross & Dickson
Denver, Colorado

WATER AS A PUBLIC RESOURCE: EMERGING RIGHTS AND OBLIGATIONS

A Short Course Sponsored by the
Natural Resources Law Center
University of Colorado
School of Law

June 1-3, 1987

University of Colorado Natural Resources Law Center
Conference on "Water as a Public Resource"
The Public's Interest in Water Quality
Panel Discussion on
Reconciling Large-Scale Water
Development and Water Quality Effects
Outline of Issues by
James W. Sanderson
Saunders, Snyder, Ross & Dickson, P.C.
June 3, 1987

- A. The State's traditional water quality standards role and 401 Certification of a 404 permit.
1. Clean Water Act § 303 and EPA Regs. 40 C.F.R., Parts 130 and 131.
 2. Clean Water Act § 401(a)(1) and EPA Regs. 40 C.F.R., Part 121.
 3. The Roles of EPA and the State in 401 Certification case law: EPA lacks authority to negate the State Certification which is more stringent. Query, what is the result if EPA believes the certification does not go far enough? See: Roosevelt Campobello International Park Commission v. EPA, 684 F.2d 1041, at 1056 (1st Cir. 1982) and U.S. v. Commonwealth of Puerto Rico, 721 F.2d 832 (1st Cir. 1983).
 4. The fact that 404 permits are authorized indicates some negative impact on water quality is contemplated by the statute.
- B. Water projects potentially can affect a beneficial use due to reduction in flow and/or due to degradation of water quality.
1. Environmental Impact Statements on Water Projects identify the nature of such impacts.
 2. Clean Water Act section 101(g).
 3. Colorado Water Quality Control Act § 25-8-104, C.R.S.
 4. 40 C.F.R., Parts 130 and 131.
 5. Corps' 404 permit Regs., 33 C.F.R., Part 320.
 6. EPA's 404(b)(1) Guidelines, Regs. found at 40 C.F.R., Part 230.

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C. Antidegradation: Water projects potentially can cause a degradation of water quality without affecting a beneficial use or can impact the vitality of a beneficial use due to flow modifications.

1. 40 C.F.R., Part 131.12.
2. EPA's publication "Questions and Answers on Antidegradation": What weight do such guidelines have?
3. 1987 Amendments to Federal Clean Water Act.
4. 404(b)(1) Guidelines.
5. Cases dealing with "antidegradation."
 - a. Commonwealth Edison v. Train, 649 F.2d 481 (7th Cir. 1980). Challenge to EPA regulations requiring an antidegradation policy to be integrated into state water quality control plans. The Court held that the suit was not ripe for decision, the regulation was directed at the states and imposed no obligation on the Plaintiff.
 - b. EDF v. Tennessee Water Quality Control Board, 660 S.W.2d 776 (Tenn. App. 1983). Challenge to a Tennessee Water Quality Control Board decision granting a certificate and permit for TVA to construct a dam. Court upheld the State decision that the waters of the river currently met, but did not exceed, levels set out in the criteria for each assigned use. The State antidegradation standard, which by its terms applied to waters whose existing quality was better than established standards or to high quality waters, was inapplicable.
 - c. Big Fork Mining Co. v. Tennessee Water Quality Control Board, 620 S.W.2d 515 (Tenn. App. 1981). Plaintiff, which had been denied a discharge permit on the basis of the State antidegradation policy argued that the terms "high quality water" and "waters of exceptional recreational or ecological significance" were unconstitutionally vague. The regulation was upheld. The policy "is set out in terms that an ordinary person exercising ordinary common sense can sufficiently understand." Id. at 519.

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D. There is a duty to interpret water quality requirements
consistent with the western water rights system.

1. Clean Water Act.

Section 101(g) "It is the policy of Congress that the authority of each state to allocate water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any state."

Section 304(f)(2)(F) throws water projects into the "nonpoint source" category.

2. Case Law:

a. National Wildlife Federation v. Gorsuch, 18 ERC 1105, 693 F.2d 156, (D.C. Cir. 1982).

b. Riverside Irrigation District v. Andrews, 22 ERC 1773, 758 F.2d 508 (10th Cir. 1985).

3. Colorado Water Quality Control Act § 25-8-104 C.R.S.

"No provision of this article shall be interpreted so as to supersede, abrogate or impair rights to divert water and apply water to beneficial uses in accordance with the provisions of sections 5 and 6 of Article XVI of the Constitution of the State of Colorado, or the provisions of Articles 80 to 93 of title 37, C.R.S. 1973 or Colorado Court determinations with respect to the determination and administration of water rights. Nothing in this article shall be construed, enforced or applied so as to cause or result in material injury to water rights . . . Nothing in this article shall be construed to allow the commission or the division to require minimum stream flows or minimum water levels in any lakes or impoundments."

4. Colorado Basic Standards Antidegradation Standard 5
C.C.R. 1002-8 § 3.1.8

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5. The 404(b)(1) regulations focus on state water quality standards and on the broader ecological concerns related to the aquatic environment. These broader concerns are similar to the values to address in the Fish and Wildlife Coordination Act 16 U.S.C. 661 et seq.
6. A balanced Mitigation Plan is the key; welcome to the "Interagency-Cooperating Agency Consultation Morass."